

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
DIVISION OF JUDGES

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MOUNTAINSIDE FARMS, a Division of Worcester  
Creameries Corp.,

Respondent,

Case No. 03-CA-097023

-against-

TEAMSTERS LOCAL UNION NO. 693,

Charging Party.

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**CHARGING PARTY'S ANSWERING  
BRIEF TO RESPONDENT'S EXCEPTIONS**

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## INTRODUCTION

On November 5, 2013, Administrative Law Judge Kenneth W. Chu issued a decision (“Decision” or “ALJD”) finding that the employer, Respondent Mountainside Farms (“Respondent,” “Employer,” or “Mountainside Farms”), had violated section 8(a)(5) and (1) of the Act<sup>1</sup> by unilaterally announcing new health insurance coverage and commencing enrollment of unit employees on September 26, 2012 and by unilaterally implementing its best, last, and final offer (“LBFO”) on October 21 and November 1, 2012 without bargaining to an overall impasse in contract negotiations. The Judge’s Decision ordered the Respondent to cease and desist from continuing to implement its unlawful unilateral changes, to make affected employees whole, and to bargain in good faith with the Charging Party, Teamsters Local Union 693 (“Union”).

The Respondent filed Exceptions to the Administrative Law Judge’s Decision and a supporting brief (“Resp.’s Brief”) on December 3, 2013. This is the Union’s Answering Brief, filed pursuant to section 102.46(d) of the National Labor Relations Board’s Rules and Regulations.

## STATEMENT OF FACTS

Mountainside Farms is a milk processing and bottling company located in Roxbury, New York [Tr. 18, 246].<sup>2</sup> The Union represents a bargaining unit of some 50 full-time production and

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<sup>1</sup> National Labor Relations Act (“Act”), as amended, 29 U.S.C. §§ 151-169.

<sup>2</sup> References in this form are to the official transcript of the proceedings. References to the exhibits of the Acting General Counsel and the Respondent appear as “G.C. Exh.” and “Resp. Exh.”

maintenance employees [Tr. 18].<sup>3</sup> The Union has represented the bargaining unit for 20 years or more [Tr. 18]. The most recent in a series of collective bargaining agreements was effective from August 1, 2008 through July 31, 2011 (“2008 CBA”) [Tr. 18-19; G.C. Exh. 2].

On June 22, 2011, the parties began negotiations on a successor agreement [Tr. 20]. The Union’s bargaining committee consisted of its president and business agent, Roberta Dunker [Tr. 17], and two employees of Mountainside Farms, David Doroski (also a steward) and Sandy Doyle (also an assistant steward) [Tr. 20]; the Union’s committee remained unchanged throughout contract negotiations. Initially, the Employer’s committee was led by Ray Bachelder the plant manager [Tr. 20, 21, 253].<sup>4</sup> Also on the committee was its controller, John Eckstein [Tr. 20, 246]. In January, 2012, Cyndi Sauter,<sup>5</sup> a labor consultant, joined the Employer’s bargaining team [Tr. 393].

The parties met in negotiations on June 22, July 20, August 17, October 5, October 26, November 16, and December 7, 2011; and on January 18, March 7, March 21, April 18, May 9, September 5, and October 15, 2012 [Tr. 12-13]. Throughout negotiations, bargaining proposals were exchanged, both in writing [Tr. 23, 34; G.C. Exhs. 3, 4, 5, 6, 7, 8, 9, 10, 12, 16, 21, 39] and orally, across the table [Tr. 26]. Throughout negotiations, both parties understood that a completed successor agreement was subject to ratification by the Union membership [Tr. 53-54, 143, 388-389].

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<sup>3</sup> The Union also represents a small unit of part-time employees; that unit is not involved in this case.

<sup>4</sup> Bachelder left the company in January 2013 [Tr. 253]; he did not testify at the hearing.

<sup>5</sup> The Decision correctly notes Sauter’s initial appearance in negotiations on behalf of the Employer [ALJD, pp. 2, 5, 6], but thereafter mistakenly refers to her as “Souter” [ALJD, pp. 7, 8, 9, 13, 17]. The Union requests that this inadvertent misspelling be corrected.

The parties reached tentative agreement on numerous subjects, but as the negotiations progressed remained far apart on health insurance and wages. Under the 2008 CBA, the Employer provided coverage to employees under the New York State Teamsters Council Health and Hospital Fund Select Care Plan; the coverage provided medical, dental, and vision benefits [G.C. Exh. 2, pp. 14-15]. As of August 1, 2010 and continuing through the last year of the contract, employees covered under the Teamsters Select Plan contributed, per week, \$15, \$28, or \$35 for single, couple, or family coverage respectfully.<sup>6</sup>

Early in negotiations, the Employer professed a desire to leave the NYS Teamsters Fund plan. Thus, its initial proposal dated July 20, 2011 included changing the insurance to an “Excellus Blue Cross/Blue Shield Plan” and increasing the employee contribution to 35% of the cost of the premium [G.C. Exh. 4].

Throughout negotiations, until the September 5 session, the Union persistently resisted leaving the Teamsters Fund Select Plan; it also resisted changing the existing employee contribution rate structure [Tr. 24, 101, 148].

The Employer’s December 11, 2011 proposals included moving to “Excellus Simply Blue Hybrid” a high deductible/health reimbursement account (“HRA”) plan [G.C. Exh. 5]. On March 7, 2012,<sup>7</sup> the Employer proposed a so-called “MERP” plan sponsored by Capital District Physicians Health Plan (“CDPHP”) [G.C. Exh. 6]. The Union rejected the proposal.

In its April 18 proposals the Employer abandoned the MERP concept and sought a high deductible/HRA plan sponsored by CDPHP under which employees would receive a

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<sup>6</sup> Employees hired after November 1, 2008 contributed \$5 more per week for such coverage.

<sup>7</sup> Hereafter, all dates refer to 2012, unless otherwise specified.

reimbursement on covered expenses up to \$2,500 (individual) or \$5,000 (couples and families), depending on the type of coverage. Employee contributions were proposed to be increased by variously \$5 per week or \$10 per week in the first year, an additional \$10 per week in the second year, and an additional \$10 per week in the third year [Tr. 35-36, 157, 316-318, 440-444, 448; G.C. Exhs. 8, 39]. The Union rejected this proposal.

At the session on May 9, 2012, the Employer proposed essentially the same insurance with increases to employee contributions of \$10 each year of a proposed 3-year term [G.C. Exh. 10]. The Union rejected this proposal.

On June 23, the Employer held, with the Union's consent, an employee informational meeting to present the terms of its health insurance proposal [Tr. 132-133, 406; G.C. Exh. 11].

No bargaining sessions took place in June, July, or August 2012 [Tr. 131-132]. On September 5, the parties met again.<sup>8</sup> The Employer presented a document entitled, "Last, Best, Final Offer" to the Union's negotiators. The terms of its health insurance proposal were similar, except that only a two-year term was proposed [G.C. Exh. 12]. The Employer dropped the proposal dealing with premium rate increases of greater than 10% and added a provision that if deductible levels were raised from the present \$2,500-single/\$5,000-family structure then HRA allowances would be increased to match the deductible. The proposal indicated that coverage under the new CDPHP plan would begin on November 1.

The Union's committee was not favorably impressed with the LBFO. However, Dunker said that the committee was not rejecting the proposal, but rather it would be taken back to

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<sup>8</sup> Sauter appeared by telephone, as her car trip to New York was interrupted by a deer accident [Tr. 427-428].

the membership for a ratification vote. Dunker said the outcome of that vote would comprise the Union's response to the offer [Tr. 213-214].

Meanwhile, the Employer began the process of enrolling employees in the new CDPHP plan. On September 26, the Employer directed employees to fill out a new health insurance enrollment forms [Tr. 51, 214-215]. A "Notice To Employees" was posted at the plant advising employees that on that date the company would "start the enrollment process for the CDPHP insurance" and specifying the information each employee "will need to have available to complete the enrollments" [G.C. Exh. 13]. The forms included enrollment applications for CDPHP medical insurance, Medicare choices PPO plan, dental insurance, and a Mountainside Farms HRA account [G.C. Exhs. 32, 33, 34, 35, 36]. The CDPHP enrollment form specified that the new coverage "is effective 11/1/2012" [G.C. Exhs. 32, 33] and that the previous coverage was effective until "10/31/12" [G.C. Exh. 32]. Approximately half of the employees completed and signed the forms on either September 26 or 27 [G.C. Exh. 33]. The remainder completed the forms on September 29 or in October [G.C. Exh. 33].

On Saturday, September 29, the Union held a membership meeting to present the Employer's LBFO dated September 5. The ratification vote failed and the LBFO was rejected [Tr. 53, 214]. The membership also voted down a strike authorization [Tr. 55].

The following week, Dunker spoke with Bachelder and advised him by telephone of the membership's rejection of the Employer's LBFO [Tr. 55-56]. On October 5, Bachelder wrote a letter to Dunker that included the following:

I wanted to follow up to our recent telephone conference regarding the upcoming negotiations meeting. As you may recall, after the employees did not ratify the contract on Saturday, September 29th, you returned my call and indicated that you

wanted to get back to the table as soon as possible. With that in mind, we set up Monday, October 15th for the next session. We look forward to sitting down and hearing what new thoughts the Union may have to resolve this matter. As such we are ready, willing and able to meet. Should you believe that the meeting will not be fruitful, please let me know.

G.C. Exh. 14.

On October 15, the parties met again for another negotiation session. The meeting was brief, perhaps 20 to 30 minutes [Tr. 57, 161]. Dunker gave to Bachelder a letter in which the Union informed the Employer of its intent to advise the public of Mountainside Farm's bargaining position and urge a consumer boycott [Tr. 57-58; G.C. Exh. 15]. Dunker's letter included a draft letter addressing the matter that was to be distributed to Mountainside customers [Tr. 57]. Bachelder was visibly upset by the Union's announced intention [Tr. 215-216]. The Employer's negotiating team distributed another proposal entitled, "Last, Best, and Final Offer," dated October 15 [Tr. 216; G.C. Exh. 16]. Except for a minor change in wording, the LBFO was identical to its previous offer of September 5. The Employer's committee then left [Tr. 216].

On October 18, Bachelder emailed to Dunker a letter, in which for the first time the Employer declared that the parties were at impasse. In relevant part, the letter stated:

As you know, after months of collective bargaining negotiations, the parties appear to be at an impasse. It is because of this impasse that we have previously forwarded to you our last, best, and final offer. In addition, because of this impasse, we have notified you that we plan on implementing the last, best, and final offer terms on Sunday, October 21, 2012.

G.C. Exh. 18. Upon receiving the correspondence, Dunker emailed Bachelder the following response:

I do not believe that we are at an impasse. We want to meet and see if we can talk about our disagreements. I am meeting with the men on Saturday and proposing an alternative agreement. In your letter you stated that "*Mountainside Farms remains committed to negotiating in good faith.*" If this is true you will come back to the bargaining table and continue to negotiate. In addition if you believe in negotiating in good faith then you will not implement your "last and Best final offer." by implementing your offer it shows that you are not interested in negotiating in good faith.

You state that you believe "*truthful communication with the public as well as the employees can be a much more effective means of resolving any differences that still exist.*"

If you are serious about discussing matters at the bargaining table then you will not implement **your contract.**

**Again I do not believe that we are at impasse, I await your reply.**

G.C. Exh. 19 (emphasis in original).

On the next day, October 19, Bachelder sent Dunker a letter that contained the following:

I am in receipt of your email dated October 18, 2012. I appreciate your prompt response to our last correspondence. By this letter I want to be very clear that the Employer's position on wages, benefits, and any other negotiated terms are set. In addition, we believe that further discussions on the issues would be futile. It is for these reasons that the parties are at an impasse.

Your email indicates that you will be proposing an alternative agreement to the employees on Saturday. Assuming the new proposal is agreed to by the employees, please advise so that we can schedule another round of meetings. Please understand that because we are at an impasse, continuing to meet with the Union to discuss new proposals from the Union does not mean we are at an impasse. It simply means we are continuing to negotiate in good faith.

G.C. Exh. 20.

Following up on her email in the evening of October 18, Dunker telephoned Bachelder on October 19. She urged him not to implement the Employer's pending offer for a week and told him that she had "other ideas" on health insurance and that the Union's internal meeting the next day, October 20, was in regard to "another health insurance" [Tr. 177, 197-198]. Dunker asked him "to hold off implementing anything until after that meeting, that we could probably work something out" [Tr. 197].

On Saturday, October 20, the Union held its membership meeting to consider and authorize a revised offer. The membership approved Dunker's tendering a proposal entitled "Alternate Contract" that, for the first time, moved to the Employer's preferred approach of a high deductible/HRA plan. The plan would be sponsored by the NYS Teamsters Health Fund and included the same reimbursement account terms as had been proposed by the Employer. The Union proposed there would be no increase in employee contribution levels. The Union moved considerably to the Employer's position on wages, proposing a four-year package, retroactive to expiration of the 2008 CBA, consisting of 35 cent per hour increases in the first two years and 50 cent per hour increases in the third and fourth years. The Union alternatively proposed a \$1,000 signing bonus in lieu of any retroactive wage payment [G.C. Exh. 21].

Dunker attempted to telephone Bachelder concerning the Union's offer on October 21, but there was no answer and his cell phone was not accepting voicemail messages [Tr. 184-185]. Despite Dunker's entreaties of October 18 and 19, the Employer did not delay implementing its final offer. On October 21, it implemented the increases in wage rates and employee contributions for the new CDPHP health insurance plan as well as the remainder of its LBFO, save for the CDPHP insurance coverage, which would take effect on November 1.

Dunker had intended that the Union's "Alternate Contract" offer was to be faxed to the Employer on Monday, October 22, the first day after Saturday that Bachelder would be working [Tr. 70, 184]. However, the document was not faxed [Tr. 70]. Doroski worked on October 22; he observed that Bachelder did not appear to have received the Union's offer [Tr. 218]. After work, he telephoned Dunker, who had acknowledged that the Union's offer had not yet been transmitted. She asked Doroski to hand deliver the document to Bachelder [Tr. 70]. Doroski did not work on Tuesday, October 23, so he delivered the document to Bachelder the next morning on October 24 [Tr. 218-219].

On October 24, Bachelder responded by email:

Today I received from Dave Doroski the union's proposal dated Oct. 20, 2012.

The reason for this email is to ask if you wish to return to the bargaining table? Was surprised by the proposal and need to understand how you would like to proceed.

G.C. Exh. 22. That same day, Dunker mailed a letter to Bachelder enclosing another copy of the "Alternate Contract" and stating the Union's belief that the parties were not at impasse and that the Union desired to return to the bargaining table to continue negotiations. She likewise urged the company to "continue with negotiations to reach a contract that will be mutually agreeable" [G.C. Exh. 23].

On October 24, Dunker and Bachelder spoke by telephone. They discussed the Union's proposal and agreed to the parties meeting on November 19 to continue bargaining [Tr. 73]. The meeting did not take place, as the Employer cancelled it because Sauter was unable to attend due to her mother's being ill [Tr. 74, 224].

## ARGUMENT

### THE ADMINISTRATIVE LAW JUDGE CORRECTLY FOUND THAT THE EMPLOYER VIOLATED ITS BARGAINING OBLIGATIONS

#### A. The Employer Violated Section 8(a)(5) and (1) by Implementing Its LBFO on October 21 and November 5, 2012

It is well established under Board law that, in general, upon expiration of the parties' collective bargaining agreement, an employer may not make unilateral changes to mandatory subjects of bargaining, unless and until a valid impasse in negotiations is reached. *Taft Broadcasting Co.*, 163 NLRB 475, 478, enforced sub nom. *Television Artists AFTRA v. NLRB*, 395 F.2d 622 (D.C. Cir. 1968); accord *Pleasant View Nursing Home*, 335 NLRB 961, 962 (2001) (citing *Bottom Line Enterprises*, 302 NLRB 373 (1991)). See generally *NLRB v. Katz*, 369 U.S. 736 (1962).

In this case, as the Judge correctly found, during bargaining over a successor contract that expired on July 31, 2011, the Employer implemented its LBFO, which included unilateral changes to wages and its health insurance program, on October 21 and November 1, 2012. Because there never was an impasse in bargaining, the Employer's unilateral action violated section 8(a)(5) and (1). Even if an impasse had occurred, it was broken before the announced implementation dates of October 21 and November 1. In either event, the Employer's conduct was unlawful.

#### B. The Employer Failed to Prove an Impasse Existed at the Time of Implementation

An impasse in negotiations occurs at the point, under the extant circumstances, that the parties have exhausted the prospects of concluding an agreement and further discussions would be fruitless. *Laborers Health & Welfare Trust Fund v. Advanced Lightweight Concrete*, 484 U.S. 539, 543 (1988). "A genuine impasse in negotiations is synonymous with a deadlock.

The parties have discussed a subject or subjects in good faith, and despite their best efforts to achieve agreement with respect to such, neither party is willing to move from its respective position.” *Hi-Way Billboards, Inc.*, 206 NLRB 22, 23 (1973).

“As a recurring feature in the bargaining process, impasse is only a temporary deadlock or hiatus in negotiations ‘which in almost all cases is eventually broken, through either a change of mind or the application of economic force.’” *Charles D. Bonanno Linen Service, Inc. v. NLRB*, 454 U.S. 404, 412 (1982) (quoting *Charles D. Bonanno Linen Service, Inc.*, 243 NLRB 1093-1094 (1979)). That is, a bargaining deadlock “does not destroy the collective-bargaining relationship. Instead a genuine impasse merely suspends the duty to bargain over the subject matter of the impasse until changes in circumstance indicate that an agreement may be possible.” *Air Flow Research & Mfg. Corp.*, 320 NLRB 861, 862 (1996).

If there is a distinct possibility of further movement on important issues, there is no impasse, notwithstanding a “wide gap between the parties’ bargaining positions.” *Newcor Bay City*, 345 NLRB 1229, 1238 (2005). Thus, “futility rather than mere frustration, discouragement, or apparent gamesmanship is necessary to establish impasse.” *Grinnell Fire Prot. Sys. Co. v. NLRB*, 236 F.3d 187, 199 (4th Cir. 2000) (enforcing *Grinnell Fire Prot. Sys. Co.*, 328 NLRB 585 (1999)).

Even where the parties have reached an impasse in negotiations, “[a]nything that creates a new possibility of fruitful discussion breaks an impasse and revives an employer’s obligation to bargain over the subject of the impasse.” *Pavilions at Forrestal*, 335 NLRB 540, 540 (2008). This can include “informal discussions that are ‘something less than negotiations.’”

*Hotel Bel-Air*, 358 NLRB No. 152, slip op. at 1 (2012) (quoting *Comau, Inc.*, 356 NLRB No. 21, slip op. at 9 n. 20 (2010), *enforcement denied on other grounds*, 671 F.3d 1232 (D.C. Cir. 2012)).

Among the factors the Board looks to to determine whether a genuine impasse exists are the bargaining history, the parties' good faith in conducting negotiations, the length of the negotiations, the importance of the issue or issues about which there is disagreement, and the contemporaneous understanding of the parties as to the state of negotiations. *Taft Broadcasting*, 163 NLRB at 478.

The burden of proving the existence of an impasse rests with the party asserting that an impasse existed and permitted its unilateral action. *CJC Holdings, Inc.*, 320 NLRB 1041, 1044 (citing *Outboard Marine Corp.*, 307 NLRB 1333, 1363 (1992)).

An employer's committing serious, unremedied unfair labor practices precludes the existence of a genuine impasse. *Times Union, Capital Newspapers Div.*, 356 NLRB No. 169, slip op. at 10 (2011) (citing cases); *White Oak Coal Co.*, 295 NLRB 567, 568 (1989) ("a lawful impasse cannot be reached in the presence of unremedied unfair labor practices").

**1. The Parties were Not at Impasse on September 5, 2012**

Contrary to the Employer's contentions in support of its Exception No. 1 [Resp.'s Brief, pp. 3-5], the parties were not deadlocked on September 5. Rather as the Judge found, it is plain that the parties did not reach a good faith impasse [ALJD pp. 15-18].

The Judge correctly cited that at the September 5 session the Union showed significant movement on the issue of wages, indicating to the Employer that it could accept a 35 cents per hour increase, rather than the 65 cents it had previously insisted upon [ALJD, p. 16; Tr. 144-147]. The Judge also properly relied on the Union's willingness to accept a high deductible/HRA

plan, if other conditions were met [ALJD, p. 10; Tr. 154-156]. The Judge likewise found that there was room for negotiations with regard to the amount of the weekly contributions. Thus, although the Employer now insists that it was inalterably set on its proposal for a \$10 per week increase, the Judge properly found that the Employer had been willing to move to a \$5 increase at the previous bargaining session on April 18 [ALJD p. 16 and n. 12; G.C. Exh. 39; Tr. 157-158, 440-448].

The Judge also correctly relied upon Dunker's position that while she was not favorably disposed toward the LBFO, the Union's response to it would come after she met with the membership [ALJD 17]. This was not a rejection of the Employer's offer, but rather a deferral in providing an answer until the offer was presented to the membership for approval or rejection [Tr. 49, 149-150, 213-214].

The absence of a firm response by the Union precluded an impasse. *R.E. Dietz Company*, 311 NLRB 1259 (1993), is instructive on this point. On analogous facts, the Board explained:

The Respondent's final offer -- its so-called "impasse offer" -- was not submitted to the membership of the [u]nion for ratification until either late February or sometime in March. Until that event occurred, it is idle to suggest the existence of an impasse since there was no response by the [u]nion to the Respondent's firm and final proposal. Since the Respondent was bound to deal with [u]nion representatives, not bargaining unit members, and was not fully informed as to the nature and result of the ratification vote until May 10, no impasse could have arisen until at least that date.

311 NLRB at 1267.<sup>9</sup>

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<sup>9</sup> This view of membership-ratification's role in the determination of whether an impasse exists is not inconsistent with *Ead Motors Eastern Air Devices, Inc.*, 346 NLRB 1060 (2006), in which the Board stated that "a ratification vote does not itself show that the parties are at impasse." *Id.* at 1063. There, the employer had declared impasse at the point the membership voted to reject the employer's offer made at the contract's expiration. The evidence

Moreover, the evidence also shows that the Employer itself did not consider the parties to be at impasse until the occurrence of the October 15 negotiation session and its follow-up correspondence of October 18 [G.C. Exh. 18]. The “contemporaneous understanding of the parties” as to whether an impasse had been reached weighs heavily in determining whether, in fact, a good faith impasse has occurred. *Union Essex Valley Visiting Nurses Ass’n*, 343 NLRB 817, 841 (2004) (“most significantly, neither party stated that the parties had reached impasse at the close of the meeting, and there can be no finding that by the close of the meeting, there was a ‘contemporaneous understanding of the parties’ that an impasse had been reached.”) (citing *CJC Holdings, Inc.*, 320 NLRB 1041, 1045 (1996)); *Union Nacional de Trabajadores*, 219 NLRB 862, 870 (1975) (no impasse where, among other things, “no one suggested at the time that an impasse existed”), *enforced*, 540 F.2d 1 (1st Cir. 1976) *cert. denied*, 429 U.S. 1039 (1977).

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supported the employer’s factual contention that historically the parties had treated the expiration of the contract as the point at which the union would hold a ratification vote on the employer’s pending offer. The employer extrapolated from that fact that its bargaining obligation was then satisfied and it could lawfully implement terms, in the event the membership rejected the last offer. It was in this context that the Board explained:

However, the fact that there is a ratification vote does not itself show that the parties are at impasse. More particularly, if the vote is to approve the proposal there is a contract. If the vote is to reject it, there must be more bargaining. A separate issue is whether more bargaining would be futile because the parties are at impasse. But that issue turns on the factors noted above, not on the mere fact of a negative ratification vote. . . . [Here], the evidence showed only that prior negotiations had ended in a positive ratification vote, sometimes against the union committee’s recommendation. There was no evidence that in prior bargaining the parties had attempted, much less been unable to reach agreement after a failure to ratify the Respondent’s final offer.

*Id.* at 1063-1064. Thus, in *Ead Motors*, the Board did not hold that membership ratification is a separate process, irrelevant to whether an impasse exists. The Board merely rejected the notion that a failed ratification vote itself established the existence of an impasse. That determination depends on the myriad of factors contemplated by *Taft Broadcasting, supra*, 163 NLRB 475, and its progeny.

Finally, the Employer excepts to the Judge's finding of no-impasse on September 5 on the basis that its May 9 proposal was not denominated a last, best, and final offer [Resp.'s Brief, pp. 3-4]. That may be true [G.C. Exh. 10], but the distinction is one without a difference. The salient point is that the Employer's LBFO as of September 5 contained substantial changes from its May 9 proposal. The Judge appropriately found that more bargaining was needed to explore the parties' willingness to reach agreement [ALJD, p. 16]. Notwithstanding the disingenuous denials of the Employer's witnesses [Tr. 329-334, 429-436], the changes in the duration of the proposed agreement and in the health insurance provisions were plainly significant and material.

**2. The Employer's Actions in Commencing Implementation of Its Health Insurance Proposal on September 26, 2012 Violated Section 8(a)(5) and Thus Precluded a Genuine Impasse**

Because the existence of a genuine impasse necessarily contemplates that the parties have bargained in good faith, an employer's commission of an unfair labor practice that affected the negotiations precludes a finding that the parties were at an impasse that would allow the employer's unilateral action. *Dynatron/Bondo Corp.*, 333 NLRB 750 (2001); *Quirk Tire*, 330 NLRB 917 (2000). Here, the Judge correctly found the Employer's conduct in announcing and commencing the enrollment process for the new CDPHP insurance was unlawful and necessarily tainted the parties' bargaining [ALJD, pp. 18-20].<sup>10</sup> The Respondent's Exception No. 2 to the finding is without merit and must be denied [Resp.'s Brief, pp. 5-6].<sup>11</sup>

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<sup>10</sup> This allegation was not specified in the amended complaint, but the Judge nonetheless found that the matter was properly before him essentially because it was clearly connected to the gravamen of the complaint and "vigorous examination on this issue was undertaken by both parties during the hearing" [ALJD, p. 19 n. 13]. This approach comports with Board law. "It is well settled that the Board may find and remedy a violation even in the absence of a specified allegation in the complaint if the issue is closely connected to the subject matter of the

A good faith impasse could not have occurred because on or before September 26 the Employer announced it was implementing its health insurance proposals. The Employer posted a “Note to Employees” announcing that “[o]n September 26, 2012 at 10:00 a.m. the company will start the enrollment process for the CDPHP insurance” [G.C. Exh. 13]. On that date, the Employer began enrolling employees in the new insurance plan [Tr. 51-52]. It told employees that their Union had been presented with management’s last, best, and final offer [Tr. 349].<sup>12</sup>

In any case, there is no evidence that, when directed to fill out the application forms, employees were told that these preliminary steps were only conditionally preparatory, that the switch to an entirely different health insurance plan was contingent upon either the parties’ eventually reaching such an agreement or the Employer’s obtaining the lawful right to

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complaint and has been fully litigated.” *Casino Ready Mix, Inc.*, 335 NLRB 463, 464 (2001) (quoting *Pergament United Sales*, 296 NLRB 333, 334 (1989), *enforced*, 920 F.2d 130 (2d Cir. 1990)).

Moreover, the Employer has interposed the affirmative defense of impasse, on which it bears the burden of proof. Thus, facts and legal conclusions that would rebut such a finding are at issue. See *Vico Prods. Co.*, 336 NLRB 583, 589-90 (2001) (ALJ erroneously disallowed exploration of issue at hearing on grounds that issue not raised in complaint because issue was raised by respondent as an affirmative defense); *Dayton Newspapers*, 339 NLRB 650, 656, 667 (2003) (Board considered and found lockout to be unlawful in response to respondent’s business justification defense for failing to reinstate strikers, despite fact that Regional Director had dismissed charge alleging unlawful lockout).

<sup>11</sup> In support of its exception the Employer contends only that the meeting with and signing up of employees “was a mere formality to fully implement the health insurance on October 21, 2012 should the parties remain at impasse on that date [Resp.’s Brief, p. 5]. That contention is meritless in the face of the Judge’s findings discussed above.

The Employer does not argue, and therefore has waived, any assertion it did not receive fair notice of the allegations. *Gene’s Bus Co.*, 357 NLRB No. 85, slip op. at 3 n. 11 (2011) (violation found by ALJ was not alleged in complaint, but respondent did “not except[] to the unfair labor practice finding on this basis”); *Southside Medical Center, Inc.*, 356 NLRB No. 58, slip op. at 1 n. 1 (2010) (because respondent “did not proffer any agreement or articulate any grounds for reversing the judge’s conclusion, we find that it has effectively waived this exception”); NLRB Rules & Regulations § 102.46(b) and (c) (requiring specification of the grounds for and arguments supporting any exception).

<sup>12</sup> At the hearing, after initially testifying that the employees were also told that the parties were at impasse, Eckstein retreated, first stating that he could not recall exactly what employees were told, and then denying that employees were told the plan was being implemented [Tr. 349-350].

implement such a change. Instead, the employees were instructed to fill out forms that notified them, unequivocally, that as of November 1 their existing insurance was terminated and the new CDPHP insurance would be in effect [G.C. Exhs. 32, 33].

The Judge correctly found that a reasonable employee would believe that Mountainside Farms had, in fact, determined to make the unilateral change “when it announced to and began enrollment of the unit employers” [ALJD, p. 20]. Indeed, Francis Cotten, an employee whose partially unredacted CDPHP insurance application was entered into evidence, completed the form to indicate that his previous health insurance coverage was: “Effective from: 1/1/10 To: 10/31/12” [GC Exh. 32].

These actions were plainly unlawful and, coming days before the scheduled ratification vote, could not help but taint the bargaining process [Tr. 51-52, 200-203]. See *ABC Automotive Products Corp.*, 307 NLRB 248 (1992) (announcement of implementation of new health insurance plan was itself unlawful — even in the absence of eventual implementation — because the “damage to the bargaining relationship had been accomplished simply by the message to the employees that the Respondent was taking it on itself to set this important term and condition of employment, thereby ‘emphasizing to the employees that there is no necessity for a collective bargaining agent’”) (*quoting Famous-Barr Co. v. NLRB*, 326 U.S. 376, 384-386 (1945)); see also *Titan Tire Corp.*, 333 NLRB 1156, 1159 (2001) (employer’s “threats directly related to job security and the subsequent implementation of those threats directly impacted job security” which contributed to parties’ inability to reach agreement); *Page Litho, Inc.*, 311 NLRB 881, 881 (1993) (“damage to the [u]nion’s authority as bargaining representative was accomplished by the threat and the actual implementation of the threat to set terms and

conditions of employment unilaterally thereby emphasizing to employees that there was no necessity for a collective-bargaining agreement”).

**3. There Was No Impasse on October 16, 2012**

Contrary to the Employer’s Exception No. 3 [Resp.’s Brief, p. 4], the Judge correctly found that as of October 16 there was no impasse based on the Employer’s admission [ALJD, p. 18]. Thus, during the Region’s investigation of the underlying unfair labor practice charge, the Employer’s representative stated that Mountainside Farms applied for the CDPHP plan on October 16 to “prepar[e] ourselves in the event impasse was reached” [G.C. Exhs. 41, 40]. This is a significant admission that acknowledges the Employer’s contemporaneous view of negotiations and plainly contradicts its present stance [Resp.’s Brief, p. 4]. The Judge appropriately construed it as binding on the Employer.

**4. There Was No Impasse on October 18, 2012, and, If There Was One, It Was Immediately Broken**

The Judge properly found that the parties were not at impasse, notwithstanding the Employer’s assertion in Bachelder’s letter of October 18 [G.C. Exh. 18]. Thus, the Judge noted that the Employer’s assertion of impasse was non-dispositive and found that the parties’ bargaining history, length and willingness to move in negotiations, the contemporaneous understanding of the parties as to the state of negotiations, and the Union’s demonstrated flexibility and willingness to compromise on a critical issue all established that the parties were not at impasse [ALJD, pp. 21-24]. Respondent’s Exception Nos. 4, 8, and 9 must therefore be rejected.<sup>13</sup>

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<sup>13</sup> The Union also relies on the reasons and authorities set forth in the General Counsel’s Answering Brief, pp. 6-9, 14-17

Regardless, and contrary to Respondent's Exception Nos. 7-8 [Resp.'s Brief, pp. 7-11], even if the parties were at impasse as of October 18, the ostensible deadlock was broken by Dunker's communications to Bachelder on the evening of October 18 and on October 19 [ALJD, p. 24-26]. Thus, in her reply to Bachelder's October 18 letter, Dunker vociferously denied that the parties were at impasse, advised that she was "meeting with the men on Saturday and preparing an alternative agreement," and urged the Employer not to follow through with its intention to implement on October 21. The next day, Friday, October 19, Dunker spoke with Bachelder by telephone [Tr. 196-197; G.C. Exh. 37]. In urging the Employer to hold off for a week [Tr. 177] — which would still allow for implementation on November 1 if the parties failed to reach agreement — Dunker told Bachelder the forthcoming proposal concerned health insurance [Tr. 197]. The Employer understood that a proposal from the Union was intended to be forthcoming after the Saturday meeting [Tr. 371; G.C. Exhs. 40 (p. 9 (¶ 26)), 20].

The developments were plainly sufficient to break the purported impasse. "Anything that creates a new possibility of fruitful discussion breaks an impasse and revives the employer's obligation to bargain over the subjects of the impasse." *Pavilions at Forrestal*, *supra*, 353 NLRB at 540. Thus, in *Pavilions* the cancellation of the existing health insurance by a third-party and the resulting necessity of the employer's obtaining alternate coverage "created the possibility" that the union would be convinced to alter its existing proposal. *Id.* at 541. However, "[b]y unlawfully denying the [u]nion the opportunity to bargain over the new plan and to inspect records that could very well convince [it] to change its health benefits proposal, the Respondent artificially perpetuated deadlock." *Id.*

In *Hotel Bel-Air, supra*, 358 NLRB No. 152, off-the-record discussions between the parties' negotiators that indicated a narrowing of differences were properly considered in finding that the parties' purported impasse had been broken. Slip op. at 1.

And, in a case that bears significant analogy to the instant one, *Laurel Bay Health & Rehabilitation Center*, 353 NLRB 232 (2008), the union had long resisted the employer's health insurance proposal. *Id.* at 232. At the final bargaining session, the union's chief negotiator said the union would be willing to consider alternate proposals, including the employer's plan that covered its nonunion employees. *Id.* at 233. He also said the union would be preparing a counterproposal. *Id.* The parties also agreed to another bargaining session. *Id.* However, rather than following through on any of these reasonable possibilities for productive discussion, the employer implemented its own proposals. *Id.* Because the employer failed to test the union's stated willingness to move off its position, the employer failed to carry its burden of proof on the impasse issue. *Id.*

The facts presented here likewise demonstrate that the new discussions sought by the Union were reasonably likely to be productive. Indeed, the membership *did* authorize Dunker's "Alternate Contract," which represented a very large step toward the Employer's position. The Union's new proposal abandoned the Teamsters Fund Select Plan and moved entirely to the type of high deductible/HRA proposal sought by the Employer. The Union proposed HRA funding levels that were identical. The Union also moved considerably on wages [G.C. Exh. 21]. Although the Union's proposal was not received by the Employer until after the ostensible October 21 implementation date, the Employer had sufficient information as of October 18 and 19 to require it to delay implementation and test the Union's sincerity. In short, the Union's

demonstrated change-of-heart forestalled the Employer from lawfully implementing its October 15 proposal on October 21.

#### **5. The Union Bargained in Good Faith**

The Judge properly rejected the Employer's defense that the Union itself engaged in bad faith bargaining by not vesting its negotiators with sufficient authority and by engaging in dilatory tactics [ALJD, pp. 23-24]. Respondent's Exception Nos. 5 and 6 are without merit [Resp.'s Brief, pp. 6-7]. Thus, Dunker forthrightly testified that she had the legal authority to reach a tentative agreement, but with respect to the Employer's LBFO of September 5 she felt, in her judgment as a union negotiator, that the Union's answer should come directly from the membership [Tr. 142-143]. The Judge also correctly found that Dunker diligently explored insurance options and sincerely proposed, with the membership's pre-approval, the Teamsters HRA plan, which was a significant change from its previous position.<sup>14</sup>

### **CONCLUSION**

For the foregoing reasons and authorities, as well as those stated in the Answering Brief of the General Counsel, the Charging Party respectfully submits that the Judge's Decision sets forth wholly correct findings of fact and conclusions of law. The Respondent's Exceptions should be rejected in their entirety.

Dated: January 17, 2014

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<sup>14</sup> The Union also relies on the General Counsel's Answering Brief, pp. 9-12.

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